

Administrative Law Judge Robert H. Foerschler, in his Award of March 1, 1994, found that the claimant was entitled to a permanent partial general disability of four percent

(4%) based on functional impairment. The respondent appeals this decision, requesting the Appeals Board address the following issues:

- (1) Whether the Administrative Law Judge erred by considering matters outside the evidentiary record; and,
- (2) What is the nature and extent of claimant's disability?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record and the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

(1) Administrative Law Judge Robert H. Foerschler, on page 4 of his Award, mentions that the claimant was examined by Edward J. Prostic, M.D., at the request of claimant's attorney. He also states that Dr. Prostic's opinion in reference to claimant's functional impairment of ten percent (10%) of the whole body was presented by the claimant at a pre-hearing conference. Dr. Prostic's deposition was not taken and therefore evidence of his examination and opinions are not included in the evidentiary record of this case.

The respondent argues that the Administrative Law Judge erred in considering Dr. Prostic's functional impairment rating in making his decision as to the nature and extent of claimant's disability. He further contends that since Dr. Prostic's deposition was not taken, his opinions were not a part of the evidentiary record and should not have been considered as evidence in the case.

The Appeals Board finds that the reason Administrative Law Judge Foerschler referenced Dr. Prostic's impairment rating was to explain why he found it appropriate in this case to appoint an independent health provider to examine and evaluate claimant in reference to functional impairment. The current statute, K.S.A. 44-510e(a), provides that when the employer and the employee cannot agree on functional impairment then the Administrative Law Judge shall refer the claimant to an independent health care provider who shall issue an opinion regarding the claimant's functional impairment. Neither of the doctors who testified for respondent in this case were of the opinion that claimant had any functional impairment. Since the claimant had an opinion from Dr. Prostic of a ten percent (10%) impairment and the respondent had medical opinions of zero percent (0%) impairment, the Administrative Law Judge, in accordance with the statute, was empowered to appoint an independent health care provider to render an opinion on claimant's functional impairment. The Appeals Board concludes that Dr. Prostic's medical report is not included in the evidentiary record and, therefore, will not be considered as evidence in this decision.

(2) At the time of the regular hearing, November 5, 1993, the claimant had been employed by the respondent for eleven (11) years and five (5) months. She was a utility worker who sustained a strain to her left shoulder and upper back on September 9, 1992, while shoveling icing into a production machine. Claimant reported her injury promptly to the respondent, who provided her with medical treatment through Business & Industry Health Group in Kansas City, Kansas. She was seen by Dr. Akin, Dr. Alexander, and Dr. Walker, all employed by this medical group, who provided conservative treatment to the claimant in the form of physical therapy and anti-inflammatory medication. She was taken off work from September 18 through September 20, 1992, and then she was returned to

light-duty work. Claimant was last seen by Dr. Walker on October 2, 1992, when he released her for regular work without restrictions. It was Dr. Walker's opinion that claimant suffered no permanent functional impairment as a result of her work-related injury.

After the medical treatment she received from Business & Industry Health Group, claimant remained symptomatic and then sought treatment on her own with her family physician, William T. Brown, D.O., who provided her with pain medication and with eight (8) trigger point injections. He also referred her to Dr. Fernando Egea for an EMG/NCV test which resulted in normal findings.

The respondent finally referred claimant to David K. Ebelke, M.D., an orthopedic surgeon in North Kansas City, Missouri, for an examination and evaluation of her injuries. Dr. Ebelke saw the claimant on December 9, 1992, and December 11, 1992. He referred her for an MRI scan on December 10, 1992. It showed no disc herniation and Dr. Ebelke diagnosed the claimant's injury as a cervical/thoracic/scapular strain. He released the claimant to regular work on December 14, 1992, with neither restrictions nor permanent functional impairment. The claimant has returned to her regular job earning a comparable wage. There is a presumption that the claimant has no work disability. The claimant has not presented evidence to overcome such presumption. Accordingly, claimant's permanent partial disability, if any, is limited to functional impairment. See K.S.A. 1991 Supp. 44-510e(a).

As previously referenced, because the parties disagreed on the percentage of functional impairment, the Administrative Law Judge ordered the claimant to be examined and evaluated by an independent health care provider, David Tillema, M.D., an orthopedic surgeon. Dr. Tillema examined the claimant on September 20, 1993, and his medical reports expressing his findings in reference to the examination are included in the evidentiary record of this case. Dr. Tillema's impression was that the claimant suffered myofascial pain following a soft tissue muscle strain attributed to her on-the-job injury of September 9, 1992. He found no nerve root irritation or disc herniation. Referring to the AMA Guides to the Evaluation of Permanent Impairment, Dr. Tillema opined that claimant's permanent functional impairment was four percent (4%).

The respondent sets forth the argument that the most persuasive and credible evidence in the record is the testimony of Doctors Walker and Ebelke, who were of the opinion that the claimant's left shoulder and back injury did not leave claimant with any permanent impairment. The Administrative Law Judge found that the claimant was entitled to a four percent (4%) permanent partial general disability based on functional impairment resulting from the work-connected injury. The claimant agrees with the Administrative Law Judge's award of four percent (4%), contending that it is supported by the preponderance of the credible evidence.

The Appeals Board finds, after a careful review of the whole record, that the testimony of the claimant, coupled with the medical opinion of Dr. Tillema contained in his report dated September 20, 1993, is the most persuasive evidence presented and, therefore, affirms the Administrative Law Judge's Award entitling the claimant to a four percent (4%) permanent partial general disability based on functional impairment. As the trier of fact, the Appeals Board's function is to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant in determining the question of

disability. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785-786, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board, in affirming the Award of Administrative Law Judge Robert H. Foerschler, dated March 1, 1994, also adopts and incorporates into this Order all of his findings of fact, conclusions of law, and orders as if specifically set forth in this Order.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler, dated March 1, 1994, is hereby affirmed and an award is entered as follows:

**AN AWARD OF COMPENSATION IS HEREBY ENTERED IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Donna P. Pratt, and against the respondent, Sunshine Biscuits, Inc., and its insurance carrier, Crum & Forster Insurance Company, for an accidental injury sustained on September 9, 1992, and based on an average weekly wage of \$476.15.

Claimant is entitled to 415 weeks of permanent partial general disability compensation at the rate of \$12.70 per week for a four percent (4%) permanent partial general disability, making a total award of \$5,270.50.

As of December 21, 1994, there is due and owing the claimant 119.14 weeks of permanent partial disability compensation at the rate of \$12.70 per week for a total due and owing of \$1,513.08, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$3,757.42 shall be due at the rate of \$12.70 per week for 295.86 weeks until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December, 1994.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert W. Harris, Kansas City, KS  
Gary R. Terrill, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
George Gomez, Director